

“Arasoi O Mizu Ni Nagasu” or “Let the Dispute Flow to Water”: Pedagogical Methods for Teaching Arbitration Law in American and Japanese Law Schools

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“The examination of legal education in a society provides a window on its legal system. Here one sees the expression of basic attitudes about the law: what law is, what lawyers do, how the system operates or how it should operate.”¹

I. INTRODUCTION

Recently, Japanese law schools have adopted an American-based model of legal education.² As a part of this modern restructuring, Japan is transferring many legal teaching responsibilities from applied training programs led by judges to law school courses directed by professors.³ This is

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¹ John Henry Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859, 859 (1974).

² James R. Maxeiner & Keiichi Yamanaka, *The New Japanese Law Schools: Putting the Professional into Legal Education*, 13 PAC. RIM L. & POL’Y J. 303, 313 (2004) (describing the reform in the Japanese legal system as “widely understood” as being American inspired); Luke Nottage, *Reform in Japanese Legal Education: Reformist Conservatism and Failures of Imagination in Japanese Legal Education*, 2 ASIAN-PAC. L. & POL’Y J. 28, 34 (2001) (describing recent legal education reform in Japan). Indeed, 68 law schools, with 5,767 students, began operation in Japan in April 2004. Kazuo Sugeno, *The Birth of the Labor Tribunal System in Japan: A Synthesis of Labor Law Reform and Judicial Reform*, 25 COMP. LAB. L. & POL’Y J. 519, 527 n.9 (2004).

³ Maxeiner & Yamanaka, *supra* note 2, at 307; *see also* Sugeno, *supra* note 2, at 527 n.9 (describing the new law schools as being three year programs, of which the first year may be skipped if a student has significant legal education prior to entering the law

a part of an overall shift in emphasis by Japanese law schools from graduate teaching to professional teaching of the legal curriculum.⁴

As these Japanese law schools continue their development within this new model of legal education, increasing attention is not only being paid to *what* to teach, but more importantly, *how* to teach these courses.⁵ Traditionally, Japanese universities have utilized lectures, and not much else, in conveying legal understanding to their students.⁶ Yet, a new generation of Japanese law professors, inspired by the switch to the American model of legal education and increasingly interacting with their international colleagues, have started the process of revolutionizing their law school curriculum and how it is taught.⁷

In particular, this new generation of Japanese law professors has shown interest in developing courses on alternative methods to expensive and time-consuming litigation practices.⁸ Recognizing that arbitration law pedagogy may be vastly different from traditional, legal teaching methodologies,⁹ these

school).

⁴ Maxeiner & Yamanaka, *supra* note 2, at 309 ("In any given year there are approximately 45,000 undergraduates studying at nearly one hundred university law faculties within Japan. The first year of education is given over to general liberal arts courses."); Sugeno, *supra* note 2, at 527 (explaining that the shift to professional education was part of a larger process of judicial reform in Japan to expand the legal profession).

⁵ Kobe University Center for Legal Dynamics of Advance Market Societies (CDAMS), Mission Statement (Aug. 25, 2003), http://www.cdams.kobe-u.ac.jp/aims_e.htm (lasted visited Mar. 18, 2006) ("The study of Legal Dynamics recognizes the need to incorporate the ideas of autonomous social ordering into the research and education of law and other methods of problem solving. Emphasis will be placed on theoretical and applied research as well as the practical training of practitioners in the skills of negotiation and agreement in a creative, rational, and peaceful manner.").

⁶ Maxeiner & Yamanaka, *supra* note 2, at 309 ("Law faculties typically provide large lecture classes and student participation is minimal.").

⁷ *Id.* at 313 ("Japanese legal educators are looking to the United States as the principal model in implementing the reform of legal education.").

⁸ Litigation in Japan has become increasingly expensive and time-consuming, making access to the courts more and more difficult for the average Japanese citizen. Sugeno, *supra* note 2, at 522 (noting that over the last thirteen years the number of civil suits in district court in Japan has grown by 1.5 times). One of the reasons that Japanese litigation is so expensive is because of a general shortage of lawyers in the country. *Id.* at 521.

⁹ Such traditional methodologies have focused on the theoretical, to the detriment of the practical. Maxeiner & Yamanaka, *supra* note 2, at 309 ("While classes in later years address law, they generally do so from a theoretical perspective and do not focus on case

same professors have sought advice from their international colleagues with regard to effective arbitration teaching techniques.¹⁰ It was in this spirit that my colleague, Professor Shunichiro Nakano of the Kobe University Graduate School of Law, invited me to present a series of lectures on pedagogical methods for teaching arbitration law for the Center for Legal Dynamics of Advanced Market Societies (CDAMS) in Kobe, Japan on March 15, 2005. This article is a product of those lectures and benefits greatly from the additional insights and thoughtful questions from participants at the lecture. Importantly, the Kobe lectures challenged me to revisit long-held beliefs about the nature and characteristics of arbitration law and to reconsider resourceful ways to teach this challenging topic.

The purpose of this paper is two-fold. First, it aims to establish the importance of teaching arbitration law in both the law schools of the United States and Japan, through the use of a historical overview of arbitration law in both countries.¹¹ Second, it undertakes a discussion of effective pedagogical methods for teaching arbitration law. Overall, my hope is that this analytical exercise in exploring effective pedagogical techniques will spur law schools in both the United States and Japan to consider alternative methods to teaching this important and often-neglected form of dispute resolution.¹²

The paper proceeds in the following four parts. Part II presents a concise

analysis.”).

¹⁰ Not only have delegations of Japanese legal educators traveled to the United States and other countries to learn new legal teaching methods, but American law professors have traveled to Japan to discuss legal education techniques with their Japanese colleagues. *Id.* at 313. That being said, because of differences in American and Japanese legal culture, “[i]n the end, the new Japanese law schools will be decidedly Japanese institutions.” *Id.* at 316.

¹¹ Although this article mentions international arbitration in passing, the emphasis of this paper is on domestic arbitration law in Japan and the United States. For some representative works on international arbitration law, see generally John Fellas, *A Fair and Efficient International Arbitration Process*, DISP. RESOL. J., Feb.–Apr. 2004, at 78; William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT’L L. 1241 (2003); Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT’L L. 1 (2003); Susan L. Karamanian, *Overstating the “Americanization” of International Arbitration: Lessons from ICSID*, 19 OHIO ST. J. ON DISP. RESOL. 5 (2003).

¹² General ADR courses usually focus their attention on mediation and conciliation, to the detriment of arbitration. *Teaching Arbitration in U.S. Law Schools*, 12 WORLD ARB. & MEDIATION REP. 224, 225 (2001) [hereinafter *Teaching Arbitration*].

history of the development of arbitration law in the United States and Japan. Part III explores the current important role that arbitration has come to play in the two countries. Finally, Part IV considers the proper placement of arbitration law in the law schools of the United States and Japan, possible types of instructors for arbitration law, the appropriate scope of the curriculum, and the pedagogical techniques by which arbitration may be taught.

II. A BRIEF HISTORY OF THE DEVELOPMENT OF ARBITRATION LAW IN THE UNITED STATES AND JAPAN

Rather than give a full-blown account of the American or Japanese history of arbitration, this paper merely documents the development of arbitration into a key part of the legal culture in both the United States and Japan. In this regard, Part II.A considers the American arbitration experience since the early twentieth century, while Part II.B briefly documents the German roots of arbitration law in Japan from the late nineteenth century.¹³

A. The American Experience

Arbitration law in the United States has been practiced at least as long as the country's existence,¹⁴ and has primarily been adjudicatory in nature.¹⁵ Nevertheless, until the early twentieth century, courts were often hesitant to afford the same legal protection to arbitration agreements as normal contracts.¹⁶ Indeed, there was an outright hostility among judges toward

¹³ For a much more detailed analysis of the development of arbitration law in Japan, see generally Philip J. McConaughay, *Rethinking the Role of Law and Contracts in East-West Commercial Relationships*, 41 VA. J. INT'L L. 427 (2001).

¹⁴ Brandon L. Peak, Note, *EEOC v. Waffle House, Inc.: Employers Beware—the EEOC is now the "Master of its own Case,"* 54 MERCER L. REV. 1235, 1237 (2003) (observing that arbitration had been utilized by merchants and trade associations since colonial times in America); see also Susan L. Donegan, *ADR in Colonial America: A Covenant for Survival*, ARB. J., June 1993, at 14, 14 (noting that arbitration and mediation were utilized in the colonial period).

¹⁵ See McConaughay, *supra* note 13, at 449 ("[Western countries have] multiple-step dispute resolution process[es] culminating eventually in compulsory adjudication intended to enforce precise contractual terms. But these views presuppose a Western understanding of the contract itself, which is not shared in Asia.").

¹⁶ Kenneth R. Davis, *The Arbitration Claws: Unconscionability in the Securities Industry*, 78 B.U. L. REV. 255, 263 (1998) (noting that traditional American and English

arbitration agreements until well into the twentieth century,¹⁷ under what was then known as the “ouster doctrine.”¹⁸ The shift to a pro-arbitration orientation can be viewed best through the historical prism of the three-tiers of arbitration law in American society today.¹⁹

1. *State Arbitration Law*

The first American state to adopt arbitration legislation was New York in the form of the New York Arbitration Act in 1920.²⁰ Under the New York legislation, the traditional hostility toward arbitration law was transformed into a general legal presumption favoring the enforceability of such agreements.²¹ For instance, under the New York law, arbitration agreements are entitled to the same presumption of enforceability as other contracts.²² Moreover, arbitrators’ decisions are given much deference by the courts and the grounds for appealing an arbitrator’s decision are limited.²³ It may be surmised that the reason for this change in attitude toward arbitration was

common law doctrines were hostile to the use of arbitration because it was seen as inappropriately ousting jurisdiction from the courts); Peak, *supra* note 14, at 1237–38 (noting that early American law “shunned and disfavored the use of arbitration as a means of dispute resolution”).

¹⁷ Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 599–601 (1997) (outlining the initial reluctance of British courts to enforce arbitration agreements).

¹⁸ Under the “ouster doctrine” derived from the English common law, arbitration agreements were deemed to wrongly “oust” properly constituted courts of their jurisdiction. *Kill v. Hollister*, 95 Eng. Rep. 532 (K.B. 1746); *see also* *Ins. Co. v. Morse*, 87 U.S. 445, 451–52 (1874) (adopting English ouster rule).

¹⁹ James H. Carter, *The International Commercial Arbitration Explosion: More Rules, More Laws, More Books, So What?*, 15 MICH. J. INT’L L. 785, 793 (1994) (book review).

²⁰ *See* Willibald Posch, *Resolving Business Disputes Through Litigation or Alternatives: The Effects of Jurisdictional Rules and Recognition Practice*, 26 HOUS. J. INT’L L. 363, 366 (2004) (citing N.Y. C.P.L.R. § 7501ff (McKinney 1980)), *available at* <http://www.aals.org/profdev/international/posch.pdf>.

²¹ *See* STEPHEN K. HUBER & E. WENDY TRACHTE-HUBER, *ARBITRATION: CASES AND MATERIALS* 5 (1998).

²² The New York legislation rendered enforceable any “written agreement to submit any controversy thereafter arising or any existing controversy to arbitration” and permitted “the courts of the state to enforce it and to enter a judgment on an award.” N.Y. C.P.L.R. § 7501-14 (McKinney 1980 & Supp. 1996).

²³ *See id.* § 7511(b) (outlining grounds for a court to vacate an arbitration award).

because most people recognized that arbitration permits a more informal process for resolving legal disputes and therefore promotes a less expensive and more accessible adjudicatory process.²⁴

Although the New York legislation has now been surpassed in prominence by the Uniform Arbitration Act of 1955 (UAA),²⁵ it marked the beginning of more friendly federal and state judicial attitudes toward arbitration agreements. Indeed, all states now have some form of arbitration statute that favors the enforcement of arbitration agreements on the same ground as any other contract;²⁶ although, as seen in the next section, federal arbitration law may preempt the application of state arbitration statutes in many circumstances.²⁷

2. Federal Arbitration Law

Shortly after the enactment of the New York legislation, federal legislation was enacted in the form of the Federal Arbitration Act (FAA).²⁸ Like the New York Arbitration Act, the FAA has operated to change legal

²⁴ *Rio Algom Inc. v. Sammi Steel Co., Ltd.*, 562 N.Y.S.2d 486, 488 (N.Y. App. Div. 1990) (citing *Matter of Nationwide Gen. Ins. Co. v. Investors Ins. Co. of Am.*, 37 N.Y.2d 91, 95 (N.Y. 1975)) (observing New York state policy “to favor and encourage arbitration as means of expediting the resolution of disputes and conserving judicial resources”).

²⁵ In general, the provisions of the UAA parallel those of the Federal Arbitration Act (FAA) in favoring the use of arbitration. Joseph Colagiovanni & Thomas W. Hartmann, *Enforcing Arbitration Awards*, DISP. RESOL. J., Jan. 1995, at 14 (comparing in a detailed manner the provisions of the FAA to the UAA).

²⁶ Some thirty-seven states have now adopted the UAA, but all states have some form of an arbitration statute. Reuben, *supra* note 17, at 596 n.60 (listing arbitration statutes for all fifty states and the District of Columbia). Additionally, a number of states have adopted the UNCITRAL Model Law on International Commercial Arbitration, *see infra* note 35, rather than the UAA. Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 526 n.340 (2004) (noting that, as of 2003, five states had adopted the UNCITRAL Model Law on International Commercial Arbitration including California, Connecticut, Illinois, Oregon, and Texas).

²⁷ *See infra* note 29 and accompanying text.

²⁸ 9 U.S.C. §§ 1–15 (2000). The FAA was initially referred to as the United States Arbitration Act, but its name was changed to its present form in 1947. Michael H. LeRoy, *Jury Revival or Jury Reviled: When Employees Are Compelled to Waive Jury Trials*, 7 U. PA. J. LAB. & EMP. L. 767, 774 n.56 (2005).

and judicial attitudes toward arbitration.²⁹ For instance, Section 2 of the FAA unequivocally states that arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³⁰ Moreover, the same limited judicial review rights apply to arbitration agreements subjected to the FAA.³¹ Most importantly, the FAA widely preempts any existing state laws which are hostile to the enforcement of arbitration agreements evidencing interstate commerce.³²

3. *International Arbitration Law*

Even more recently, the United States—and attorneys in the United States representing private commercial clients—has actively engaged in international arbitration. Consistent with this development, the United States ratified in 1970 the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.³³ To implement the ratification of the New York Convention, the FAA was amended in 1970 and 1990 to provide for the enforcement of foreign and non-domestic arbitral awards.³⁴ That being said, neither the Convention nor the amendments to the FAA give much substance as to how arbitration should take place on the international level. And, unlike countries like Germany and Japan which have adopted arbitration statutes based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial

²⁹ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (finding that FAA contains “a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary”).

³⁰ 9 U.S.C. § 2 (2000).

³¹ *Id.* § 10.

³² *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (finding mandatory arbitration clause enforceable under the FAA, which preempted state law requiring actual dispute to exist prior to agreement to arbitrate); *Perry v. Thomas*, 482 U.S. 483, 490–91 (1987) (discussing the wide preemptive scope of the FAA); *id.* at 489 (citing 9 U.S.C. § 2) (“Section 2 [of the FAA] . . . embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable ‘upon such grounds as exist at law or in equity for the revocation of any contract.’”).

³³ Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 CHI. J. INT’L. L. 303, 303 (2004).

³⁴ HUBER & TRACHTE-HUBER, *supra* note 21, at 5.

Arbitration (ML),³⁵ the United States continues to rely primarily on the FAA.³⁶ Indeed, some scholars on the international front have criticized the United States for not adopting an arbitration regime more in line with current international arbitration realities.³⁷

B. *The Japanese Experience*

Many individuals are already aware of the different cultural traditions for resolving disputes in the East and West. Dean McConaughay, for instance, has observed that in Asia, "the pursuit of compulsory adjudication involved an unseemly emphasis on private interests in societies where individual interests always were subordinate to those of the group; it was as if participating in adjudication involved a public display of selfishness."³⁸ Be that as it may, two of the more interesting and less known facts about Japanese arbitration law are that Japan adopted a national arbitration law well before the United States, and that the law was nearly identical to the German arbitration laws of the time.³⁹ Japan's first arbitration law was enacted in 1890 as Law No. 29.⁴⁰ Under Law No. 29:

³⁵ UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985, UN Doc. A/40/17 (1985), available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/ml-arb-e.pdf>. This UNCITRAL model has been adopted by over thirty-five countries. Stephen K. Huber, *Arbitration and Contracts: What Are the Law Schools Teaching?*, 2 J. AM. ARB. 209, 267 (2003).

³⁶ See Anne Herrman, *Drawing a Contrast: Interim Measures of Protection in International Arbitral Proceedings—The United States v. Germany*, 9 VINDOBONA J. INT'L COM. L. & ARB. 49, 67 (2005) ("The United States of America and Germany are two countries with one important difference in the field of international arbitration: Germany has just recently adopted a completely new arbitration law based on the UNCITRAL Model Law in order to make it a more favorable forum for international arbitration, whereas the United States' arbitration law in the form of the FAA has been changed little since its adoption in 1925.").

³⁷ *Id.* at 68 ("If the United States were to adopt the UNCITRAL Model Law, or amend the FAA based on the UNCITRAL Model Law, it could accomplish certain objectives that would be desirable in attracting international parties and would better accord with generally accepted international practices for arbitration.").

³⁸ McConaughay, *supra* note 13, at 450.

³⁹ Luke Nottage, *Japan's New Arbitration Law: Domestication Reinforcing Internationalisation*, 7 INT'L A.L.R. 54, 56 (2004).

⁴⁰ *Id.* Professor Tatsuhiko Hagizawa has explained:

The modern arbitration system or the arbitration law was first introduced in Japan in 1890 by the enactment of the Code of Civil Procedure (Law No. 29) that provided

[T]he arbitrators chosen by each party settle[d] disputes by conciliation in arbitration procedures (which is called *Schiedsverfahren* in German) much as mediators or conciliators do in conciliation procedures (which is *Guteverfahren* in German) instead of taking an adversarial or adjudicatory approach. Th[is] conciliation ideology . . . underlies the Law in Japan unlike arbitration laws in the vast majority of other national jurisdictions.⁴¹

Thus, Japanese arbitration law has traditionally favored a conciliatory model rather than the adjudicatory model of the West or the United States.⁴² On the other hand, and similar to the United States, Japan has ratified the New York Convention⁴³ and has since ratified or become a state-party to fourteen bilateral treaties with other countries guaranteeing the enforcement of foreign arbitral awards.⁴⁴ In fact, to date, no Japanese court has refused to enforce foreign arbitral awards against Japanese citizens.⁴⁵

Nevertheless, while Japan did enact arbitration legislation prior to the United States, arbitration has been traditionally underutilized in Japan.⁴⁶ In

for arbitration procedure in Book VIII. The contents of the Law, which were a translation of Book X of the German Code of Civil Procedure of 1877 (in its original form), were almost identical to those contained in the German code.

Tatsuhiko Hagizawa, *Characteristics of International Commercial Arbitration in Japan—With Primary Emphasis on Problems Associated with Revising the Japanese Arbitration Law*, 13 WORLD ARB. & MEDIATION REP. 17, 17 n.3 (2002).

⁴¹ Hagizawa, *supra* note 40, at 18.

⁴² See McConaughay, *supra* note 13, at 443 (“The primacy of relationships in the governance of Asian commercial affairs, moreover, resulted in the development of a host of subsidiary practices and expectations opposite of those that developed in the West: . . . [including] conflict avoidance and negotiation or conciliation . . . over all-or-nothing adjudication.”).

⁴³ Under the New York Convention, “almost all of the treaties of friendship and commerce concluded by Japan provide that a final and enforceable foreign arbitral award is conclusive in enforcement proceedings . . . and will be enforceable . . . except where contrary to public policy.” Kazuaki Sono, *The Japanese Experience: The Legal Environment for Arbitration*, in UNCITRAL ARBITRATION MODEL IN CANADA: CANADIAN INTERNATIONAL COMMERCIAL ARBITRATION LEGISLATION 25 (Robert K. Paterson & Bonita J. Thompson eds., 1987).

⁴⁴ Japan Commercial Arbitration Association (JCAA), Japan as the Place of Arbitration, <http://www.jcaa.or.jp/e/arbitration-e/kaiketsu-e/venue.html> (last visited Feb. 22, 2006) (“Japan also has bilateral treaties with 14 countries and these treaties guarantee the enforcement in other treaty countries of arbitral awards rendered in Japan. They also guarantee the enforcement in Japan of arbitral awards made in other treaty countries.”).

⁴⁵ *Id.*

⁴⁶ Nottage, *supra* note 39, at 55.

fact, despite the creation of arbitral institutions and organizations such as the Japanese Commercial Arbitration Association (JCAA),⁴⁷ historically, few disputes have been arbitrated in Japan.⁴⁸ Instead, many legal disputes in Japan are handled through structured negotiations or other forms of alternative dispute resolution, such as conciliation and mediation.⁴⁹ Professor Nottage has recently suggested that some of the more specific factors responsible for arbitration's failure to take root in Japanese society include: (1) the Japanese government's less-than-enthusiastic attitude towards arbitration in the past; (2) a lack of information about the characteristics of arbitration among both lawyers and the general public; and (3) the generally incorrect perception that domestic arbitration could be as or more costly than litigation.⁵⁰ Additionally, not until 1996 could foreign lawyers participate in international arbitrations in Japan and, to this date, foreign lawyers are not permitted to take part in domestic arbitrations in Japan.⁵¹ Not only has this additional factor no doubt made the available pool of arbitrators and advocates smaller than it would be otherwise, but such limitations have also prevented the robust exchange of ideas about arbitration between Japanese attorneys and their foreign counterparts.

Finally, and perhaps most significantly, arbitration's underutilization in Japan is based on the fact that Japan had the same arbitration legislation for about 105 years.⁵² This state of affairs meant that arbitration practice neither "reflect[ed] contemporary commercial realities nor global trends in law reform . . . towards more expeditious arbitral proceedings."⁵³

⁴⁷ The JCAA was established as the International Commercial Arbitration Committee in 1950. JCCA, History, <http://www.jcaa.or.jp/e/jcaa-e/history.html> (last visited Feb. 22, 2006).

⁴⁸ For instance, in 2000, the JCAA dealt with only nine cases. The Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange heard fifteen shipping cases, and the Japan Intellectual Property Arbitration Centre heard five cases. Nottage, *supra* note 39, at 55.

⁴⁹ *Id.* at 54. Professor Nottage has observed that some argue that one reason for arbitration's lack of popularity in Japan stems from the fact that Japanese culture "prefers harmony over conflict, group identity over individual choice, compromise over all-or-nothing solutions." *Id.* at 54-55; see also McConaughay, *supra* note 13, at 450.

⁵⁰ Nottage, *supra* note 39, at 55.

⁵¹ *Id.* The Special Measure Law concerning the Handling of Legal Practice by Foreign Lawyers was promulgated as Law No. 65 of 1996 on June 12, 1996, and went into effect on September 1, 1996. See JCAA, *supra* note 44.

⁵² Nottage, *supra* note 39, at 56.

⁵³ *Id.* This is the similar complaint now lodged against the United States for its over-

Thankfully for Japanese arbitration practice, there has been much recent legal reform, which has not only sought to change the characteristics of legal education,⁵⁴ but has also sought to modernize the law in areas such as arbitration.⁵⁵ In this regard, and as will be discussed in the next Part, Japan has adopted a statute based on the UNCITRAL model law.⁵⁶ Thus, the next Part of this article turns to an exploration of the expanded use of arbitration in both the United States and Japan. In doing so, this article aims to highlight the need for additional course offerings and inventive pedagogy for teaching this area of law in American and Japanese law schools.

III. THE GROWING IMPORTANCE OF ARBITRATION IN BOTH THE UNITED STATES AND JAPAN

In line with the last section, this part does not aim in any way to cover the current substantive provisions of American or Japanese arbitration law. Instead, the purpose of this section is to merely highlight the growing importance of arbitration to both American and Japanese society, and therefore, the necessity of teaching arbitration law in the American and Japanese legal curriculum.

A. *The American Experience*

In recent years, the use of arbitration has taken on staggering proportions in the United States.⁵⁷ For instance, statistics from the American Arbitration Association (AAA)⁵⁸ show that its caseload from 1994 to 2002 almost

reliance on the FAA. *See supra* notes 36–37.

⁵⁴ *See supra* Part I.

⁵⁵ Nottage, *supra* note 39, at 54 (noting that the revolution in arbitration in Japan is connected to broader civil justice reform which has at its center the expansion of access to justice for domestic disputes).

⁵⁶ *See infra* Part III.B.

⁵⁷ Martha Neil, *Litigation Over Arbitration*, A.B.A. J., Jan 2005, at 50, 50; Michael Z. Green, *Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements Through Collective Employee Actions*, 10 TEX. WESLEYAN L. REV. 77, 80 (2003) (noting the expanding use of arbitration in employment law and other areas).

⁵⁸ The American Arbitration Association (AAA) has become the preeminent arbitral organization in the United States. Huber, *supra* note 35, at 265 Among its many functions, the AAA sets rules for arbitration and provides trained arbitrators for all types of disputes between parties. *Id.*

quadrupled from slightly more than 59,000 cases to more than 230,000 cases, with a roster of over 8,000 neutrals hearing cases.⁵⁹ To cite yet another example of the growing influence of arbitration, securities-related arbitration claims filed before the National Association of Securities Dealers (NASD) have more than doubled from 3,617 in 1990 to 8,201 in 2004.⁶⁰ Overall, arbitration disputes in America encompass a wide range of subject matters, including disputes arising out of insurance, construction, medical claims, professional sports contracts, and international commercial transactions.⁶¹ Even McDonald's contest rules call for arbitration!⁶²

Arbitration's increasing popularity in the United States can be attributed to a number of factors. First, and foremost, is the *speed* of arbitration as a means of dispute settlement. In a recent study of 230 commercial cases from 1998 to 2002, the AAA reported that the average processing time was a little more than thirteen months.⁶³ Similarly, the average NASD arbitration was closed within an average of a little over fourteen months in 2005.⁶⁴ On the other hand, civil cases in the federal court that went to trial took an average of twenty-one months to dispose of in 2004,⁶⁵ while state courts fared even worse, taking an average of twenty-two months to dispose of tort and contract cases that went to trial in 1996.⁶⁶ A more recent study shows the

⁵⁹ American Arbitration Association, A Brief Overview of the American Arbitration Association, <http://www.adr.org/Overview> (last visited Feb. 22, 2006); American Arbitration Association, Chronology of Important Events in the History of the AAA and ADR, <http://www.adr.org/sp.asp?id=22296> (last visited Feb. 22, 2006). To be clear, many more cases are still litigated rather than arbitrated, with a whopping 352,360 civil and criminal cases filed in the United States federal courts in 2004 alone, while there are only 679 federal court judgeships. Administrative Office of the United States Courts, Judicial Facts and Figures, Table 4.1, <http://www.uscourts.gov/judicialfactsfigures/table4.01.pdf> (last visited Feb. 22, 2006).

⁶⁰ NASD Dispute Resolution Statistics, Summary Arbitration Statistics December 2005, http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&nodeId=516 (last visited Feb. 22, 2006). The NASD has over 6,000 arbitrators who are available to hear arbitration disputes. *Id.*

⁶¹ Neil, *supra* note 57, at 51; *see also* Huber, *supra* note 35, at 211.

⁶² Huber, *supra* note 35, at 211.

⁶³ American Arbitration Association, Statistics, <http://www.adr.org/sp.asp?id=22117> (last visited Feb. 22, 2006).

⁶⁴ NASD Dispute Resolution Statistics, *supra* note 60.

⁶⁵ Administrative Office of the United State Courts, Judicial Facts and Figures, Table 4.7, <http://www.uscourts.gov/judicialfactsfigures/table4.07.pdf> (last visited Feb. 22, 2006).

⁶⁶ NATIONAL CENTER FOR STATE COURTS, *Part II—The Role of Juries in State*

state of affairs worsening, with product liability trials (not concerning asbestos) taking an average time of thirty-one months to conclude in state courts in 2001.⁶⁷

Besides the speed of arbitration, another reason that parties favor arbitration revolves around the fact that they may mutually choose the procedure and rules by which the arbitration will be governed.⁶⁸ Consequently, it has been an attractive alternative for parties who wish for more flexibility in adjudication and prefer to mold their own dispute procedures to meet the specific needs of their industry, their company, and/or particular types of employees.⁶⁹ It also appears that by being able to design one's own dispute resolution mechanism, a higher percentage of disputes are settled on terms favorable to both parties. For instances, the AAA reports that in commercial cases worth between one and ten million dollars, a full 63 percent settled even before an award had to be issued by the arbitrator.⁷⁰

Courts, in EXAMINING THE WORK OF STATE COURTS 97 (2001), available at http://www.ncsconline.org/D_Research/csp/2001_Files/2001_Part_II_Section.pdf (finding that the median time in days to disposition in contract and tort jury trials in 1996 to be 671 days or approximately twenty-two months).

⁶⁷ Robert C. LaFountain & Neal B. Krauder, *An Empirical Overview of Civil Trial Litigation*, CASELOAD HIGHLIGHTS (Nat'l Ctr. for State Courts, Williamsburg, Va.), Feb. 2005, at 3, available at http://www.ncsconline.org/D_Research/csp/Highlights/Vol11No1.pdf. In Japan, the numbers are not much better, especially with the shortage of lawyers under the current system. Maxeiner & Yamanaka, *supra* note 2, at 304. There, a case can take on average 15 months to decide. REYLITO A. H. ELBO, LABOR TRIBUNAL SYSTEM: PROSPECT OF JAPAN'S NEW APPROACH TOWARDS THE EFFICIENT SETTLEMENT OF INDIVIDUAL LABOR DISPUTES 2, <http://www.jil.go.jp/profile/documents/Elbo.pdf> (last visited Feb. 22, 2006).

⁶⁸ Neil, *supra* note 57, at 50 (noting that businesses like to be able to limit discovery and set their own rules for presenting evidence).

⁶⁹ There is some dispute over whether arbitration works in favor of individual plaintiffs or company defendants. For instance, in the employment law context, Professor Lisa Bingham studied data from 232 employment arbitration cases decided in 1993 and 1994, and found that employees won at least partially in 63% of all claims. Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 213 (1997). On the other hand, when the arbitration forum was one in which the same employer utilized arbitration on numerous occasions for similar employment disputes, in other words, where the employer was a "repeat player," the employee success rate dropped precipitously to only 11%. *Id.* Thus, whether the use of arbitration is considered to favor plaintiffs or defendants may depend on such things as whether one party has substantially more experience in resolving disputes in the arbitral setting. See also NASD Dispute Resolution Statistics, *supra* note 60 (establishing that claimants have won between 43% and 54% of all arbitrations in the last five years).

⁷⁰ American Arbitration Association, *supra* note 63.

Third, arbitration is often far less expensive than adjudication in a judicial forum. Some of the reasons why arbitration is less expensive than litigation relate to the relatively faster speed, including less time spent engaging in discovery tactics and less time spent actually adjudicating the dispute.⁷¹ The quicker process also leads to lower overall attorney fees. Finally, even though the same remedies are generally available in the judicial and arbitral forum, studies show that successful claims in arbitration tend to cost defendants less money.⁷²

Of course, the use of arbitration in the United States has not been without controversy. For instance, one of the growing trends in arbitration law is the placement of form mandatory arbitration provisions in consumer and employment contracts.⁷³ The debate in this area has centered on whether such contracts are adhesive and, therefore, should be unenforceable.⁷⁴ This debate continues in many different contexts throughout the United States.⁷⁵

There is also a debate over whether repeat-player defendants have an unfair advantage over individuals engaging in arbitration for the first time.⁷⁶ Of concern is the fact that many companies and employers engage in

⁷¹ Carol Chave, *Starting an International Commercial Arbitration: Using a Preliminary Hearing Letter*, DISP. RESOL. J., Feb.-Apr. 2005, at 88, 93 (discussing how one of the advantages of arbitration over litigation is speed).

⁷² See Bingham, *supra* note 69, at 213 (finding that the average employee dealing with a non-repeat-player employer recovered 48% of what she demanded).

⁷³ Green, *supra* note 57, at 81-82 (noting disadvantages of mandatory arbitration to employees); Neil, *supra* note 57, at 52 (noting dislike of arbitration by consumer advocates).

⁷⁴ Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593, 1604-05 (2005) (expressing concerns over the troubling trend of requiring individuals to enter into adhesive-type arbitration agreements with corporations).

⁷⁵ *Id.* at 1604 (discussing adhesion issues in customer-company context); Green, *supra* note 57, at 79 (stating in employer-employee context: "Sadly, the average individual who recoils at the proposal of such an agreement to arbitrate future disputes with an employer has little bargaining power to actually refuse when the arbitration agreement is offered as a condition of employment."). For further readings on compulsory arbitration agreements in the employment and consumer context, see generally Linda Alle-Murphy, *Are Compulsory Arbitration Clauses in Consumer Contracts Enforceable?: A Contractual Analysis*, 75 TEMP. L. REV. 125 (2002); Richard A. Bales, *Creating and Challenging Compulsory Arbitration Agreements*, 13 LAB. LAW. 511 (1998); Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims With Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231 (1996).

⁷⁶ Bingham, *supra* note 69.

numerous disputes over the same matters in front of the same arbitrators in a short period of time. Additionally, for arbitration provisions to be enforceable in the consumer and employment context, the employer or company usually has to pay the arbitrator's fees.⁷⁷ Some scholars even suggest that even the most conscientious arbitrators cannot ignore the fact that a large employer could have a significant impact on their future careers as arbitrators.⁷⁸ Consequently, some authors have sought increased disclosure of arbitrators' past decisions so that companies and employers will not have an added advantage in the arbitral forum.⁷⁹

Nevertheless, although there are some significant kinks that need to be worked out in the system, arbitration is still a popular alternative dispute mechanism, as can be seen by the increasing number of cases subjected to arbitration. And it appears that arbitration will continue to play a decidedly pivotal role in America, as the country looks for ways to decrease the burden litigation places on its judicial system, financial and otherwise, and competes in an increasingly global marketplace where international arbitration is becoming widespread.

B. *The Japanese Experience*

Although at a much slower pace than is evident in America, arbitration is gradually becoming more prominent in Japanese society as well.⁸⁰ This comparatively deliberate rate of change in the use of arbitration in Japan is directly attributable to the fact that modern Japanese arbitration legislation, Law No. 138 of 2003, did not go into effect until March 1, 2004.⁸¹

⁷⁷ Sara Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1, 2 n.4 (noting that arbitration provisions requiring employees to pay arbitrator's fees have been found unconscionable).

⁷⁸ Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 346 ("Even International Chamber of Commerce arbitrators are dependent for their careers, to a degree that no judges are, on the acceptability of their awards to the parties, and perhaps especially on their acceptability to parties who are 'repeat players.'").

⁷⁹ Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 524–26 (1997) (discussing need for increased disclosure of information regarding past decisions by an arbitrator when one party is a repeat player); Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 293 (1995).

⁸⁰ Nottage, *supra* note 39, at 54.

⁸¹ *Id.* (citing Law No. 138 of 2003, <http://www.jcaa.or.jp/e/arbitration-e/kisoku->

Consequently, even as of the writing of this article in late 2005, it is not clear at all what impact the new arbitration law will have on the overall use of arbitration in Japan.

As far as Law No. 138's new structure, it bases itself on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (ML).⁸² Both the ML and the new Japanese arbitration law⁸³ have at their center the encouragement of the greater use of arbitration.⁸⁴ From a Japanese perspective, the greater importance of the law is to continue "the ongoing shift away from ex ante government regulation towards ex post remedies activated by private initiative as a more transparent and indirect means of social control."⁸⁵

Some of the key provisions of the new Japanese law mirror those in the Federal Arbitration Act (FAA), while others do not even find a counterpart in the UNCITRAL Model Law. As far as similar FAA provisions, under Article 13 of Law No. 138, the arbitration agreement must be in writing.⁸⁶ Additionally, under Article 16, parties are able to choose the number of arbitrators to hear a dispute. Finally, as in the FAA, Law No. 138 gives the parties in Article 6 wide discretion to shape the arbitral proceedings, as long as the rules are not deemed to contravene public policy.⁸⁷

On the other hand, some of the provisions in Law No. 138 are distinctively Japanese. For instance, and unlike the FAA, Articles 18 through 22 of the new Japanese law provide for detailed procedures for the dismissal and withdrawal of arbitrators.⁸⁸ Moreover, with the consent of the parties, arbitrators are permitted to seek settlement of the dispute.⁸⁹ Further, the new

e/kaiketsu-e/civil.html (last visited Feb. 22, 2006)).

⁸² *Supra* note 35.

⁸³ One key distinction, however, between the ML and Law No. 138, is that the ML only applies to international disputes, whereas the Japanese law applies to both international and domestic disputes. Nottage, *supra* note 39, at 56.

⁸⁴ *Id.* This legislation is therefore consistent with calls for increased use of arbitration in Japan made by Japanese arbitration institutions such as the JCAA. In addition, foreign government entities, such as the U.S. Trade Representative, have recommended that Japan reform its arbitration practices in a manner consistent with international practice to promote economic growth and private sector competition. *US Encourages ADR in Japan*, DISP. RESOL. J., Nov. 2004–Jan. 2005, at 7.

⁸⁵ Nottage, *supra* note 39, at 56.

⁸⁶ *Id.*

⁸⁷ *Id.* at 57.

⁸⁸ *Id.*

⁸⁹ *Id.* This practice has been referred to as "compromising arbitration," and is clearly

law in Articles 50-55, provides for criminal sanctions for corrupt arbitrators.⁹⁰ Last, and significantly, the Japanese law in its Supplemental Provisions does not apply to individual labor disputes and permits consumers to cancel any arbitration agreement with a firm.⁹¹

In all, Law No. 138 has many of the hallmarks of both the FAA and the ML. On the other hand, the new law has a significant Japanese flavor to reflect the social norms of Japanese society. And as far as whether the law will be successful in encouraging greater use of international and domestic arbitration, the jury is still out. But one thing that can be said at this early date with some confidence is that factors outside of the purely arbitral context will continue to play a significant role in determining the extent to which arbitration will begin to play a larger part in Japanese legal culture. To name just one obvious example, the relatively small number of currently trained lawyers in Japan may continue to make it difficult to have a sufficient number of trained arbitrators to support the growing system.⁹² In addition, the inability of foreign lawyers to engage in domestic arbitration in Japan will likely also further stymie faster growth.⁹³

Thus, not only will the new arbitration law need to be molded to meet societal demands, but extraneous impediments to greater use of arbitration must also be eliminated. Nevertheless, such reforms will eventually take place and there is little doubt that arbitration will play an increasingly pivotal role in Japan. Consequently, and as in America, this increasing emphasis on arbitration makes the effective teaching of this subject area in the new professional Japanese law schools critical. In fact, in light of the current state of legal affairs with regard to arbitration in both America and Japan, any Japanese or American attorney must have a solid legal grounding in arbitration law.

derived not only from the conciliation orientation of prior Japanese arbitration law, but also on a larger scale, derives from Japanese cultural norms. *Id.* at 57 n.16; *id.* at 54 ("Rather than litigation, Japan still resolves more of its disputes through (more or less) structured negotiations and ADR processes."); *see also* McConaughay, *supra* note 13, at 450.

⁹⁰ Nottage, *supra* note 39, at 57.

⁹¹ Tatsuya Nakamura, *Salient Features of the New Japanese Arbitration Law Based Upon the UNCITRAL Model Law on International Commercial Arbitration*, JCAA NEWSLETTER, Apr. 2004, at 5-6.

⁹² That being said, Japan is in the process of growing the number of individuals who can study and practice law in Japan. Maxeiner & Yamanaka, *supra* note 2, at 326-27.

⁹³ Nottage, *supra* note 39, at 59. As Nottage points out, at present, foreign lawyers are only permitted to participate in international arbitration disputes in Japan. *Id.*

IV. PEDAGOGICAL METHODS FOR TEACHING ARBITRATION LAW IN AMERICAN AND JAPANESE LAW SCHOOLS

The previous sections have clearly highlighted the increasing importance of arbitration in the United States and Japan. So, it can hardly be considered surprising that nearly all law schools in the United States cover arbitration law to some extent, whether through an Alternative Dispute Resolution (ADR) class or through a stand-alone arbitration course.⁹⁴ Arbitration concepts are also increasingly appearing in first year law courses such as civil procedure, contracts, and legal research and writing.⁹⁵

Having established the overriding importance of incorporating arbitration into American and Japanese law school curriculums, the following four subsections consider some suggested placements of arbitration in the law school curriculum, potential instructors to teach such a curriculum, the appropriate scope of an arbitration curriculum, and finally, and most crucially, the pedagogical method by which such courses may be taught.

A. A Suggested Placement for Arbitration in the Law School Curriculum

Legal educators often declare the formative significance of the first year of law study.⁹⁶ During the first year of legal education, students form ideas

⁹⁴ *Teaching Arbitration*, *supra* note 12, at 225 (finding that 155 of 168 surveyed law schools teach arbitration in one form or another, while 36 offer a general course in arbitration). Some law schools, in addition, offer specialized arbitration courses such as international commercial arbitration or labor arbitration. *Id.* It might be noted here that arbitration should also be taught to undergraduates and other professional school students, such as business school students. Mark Levin, *Legal Education for the Next Generation: Ideas from America*, 1 ASIAN-PAC. L. & POL'Y J. 3, 5 (2000). While law students will be the ones most likely participating in actual arbitration proceedings as lawyers and judges of the future, some undergraduate students will no doubt become the nation's administrators and business leaders of tomorrow and be involved in that capacity. *Id.*

⁹⁵ Stephen J. Ware, *Teaching Arbitration Law*, 14 AM. REV. INT'L ARB. 231, 231 (2003).

⁹⁶ Under the new model for Japanese legal system, it appears that much of the formative training will occur in the first year of the Japanese legal curriculum. Maxeiner & Yamanaka, *supra* note 2, at 318-19.

about the duties of a lawyer and what law practice entails.⁹⁷ For this reason, introducing arbitration in first year American and Japanese legal curriculum could have a profound impact on students' acceptance of arbitration as a valid and effective alternative to litigation. Nevertheless, given the hectic nature of the first year of law school, it is unlikely that arbitration could, or should, be taught as a stand-alone course in the first year.

That being said, a brief introduction to arbitration in first year courses is still possible and appropriate. Indeed, even just a taste of the topic can encourage students to seek out more comprehensive and specialized courses in arbitration in their second and third years. At the very least, arbitration should be studied as part of one of three possible first year classes. First, arbitration fits naturally into a basic contracts course due to the contractual nature of arbitration agreements.⁹⁸ Not only can the contracts curriculum include the theories and procedures of arbitration, but it can also be shaped to discuss specific issues that arise equally in arbitration such as the "battle of the forms."⁹⁹ Second, a course focusing on the rules of litigation, such as civil procedure, is an ideal setting for an introduction to arbitration.¹⁰⁰ Moreover, a comparison of litigation and arbitration leads most students to determine that arbitration is an effective means of attaining an enforceable award without resorting to judicial intervention.¹⁰¹ Third, and finally, a traditional legal writing course can be utilized to examine arbitration.¹⁰² As most legal writing classes require students to write at least one memorandum

⁹⁷ Leonard L. Riskin, *Disseminating the Missouri Plan to Integrate Dispute Resolution Into Standard Law School Courses: A Report on a Collaboration With Six Law Schools*, 50 FLA. L. REV. 589, 596 (1998). As far as Japanese law students are concerned, they might have greater legal knowledge given previous undergraduate legal courses. Maxeiner & Yamanaka, *supra* note 2, at 319–20.

⁹⁸ Stephen K. Huber, *The Role of Arbitrator: Conflicts of Interest*, 28 FORDHAM URB. L.J. 915, 919 (2001).

⁹⁹ See Ware, *supra* note 95, at 240.

¹⁰⁰ Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681 (2005). Nevertheless, Professor Sternlight observes that, "[m]y informal survey of civil procedure colleagues through the Association of American Law Schools (AALS) civil procedure listserve revealed that few spend more than a day or two on ADR issues and that most who do cover ADR treat it quite separately from the rest of civil procedure." *Id.* at 683.

¹⁰¹ Lea B. Vaughn, *Integrating Alternative Dispute Resolution (ADR) Into the Curriculum at the University of Washington School of Law: A Report and Reflections*, 50 FLA. L. REV. 679, 695–96 (1998).

¹⁰² Kate O'Neill, *Adding an Alternative Dispute Resolution (ADR) Perspective to a Traditional Legal Writing Course*, 50 FLA. L. REV. 709, 710 (1998).

addressing a specific legal issue, that issue could be one related to arbitration, such as the arbitrability of a dispute under a given arbitration provision.¹⁰³

Of course, arbitration is taught more comprehensively in upper-level law school courses, such as Alternative Dispute Resolution (ADR).¹⁰⁴ Nevertheless, in ADR courses, arbitration may be overshadowed by conciliation, mediation, and negotiation.¹⁰⁵ Also, specialized courses such as labor arbitration and international commercial arbitration, to the extent that they are offered,¹⁰⁶ tend to be low-enrollment courses.¹⁰⁷ Therefore, while appropriate for advanced students concentrating on specific types of arbitration, such specialized courses are inadequate for providing the basic understanding of arbitration that all students should acquire. In this respect, arbitration is most effectively taught as a self-contained topic, not as an aspect of another doctrinal category.¹⁰⁸ Therefore, a course in general arbitration law is the optimal setting for instruction, though any coverage of arbitration, including in the first year courses, is certainly better than none at all.

B. Possible Instructors for Arbitration Courses

So what types of teachers are best suited to teach arbitration law? On the one hand, full-time professors are familiar with the law school environment and the educational needs of their students, and also have a broad understanding of teaching methodologies.¹⁰⁹ That being said, many full-time professors lack substantive knowledge of arbitration, as well as any experience as arbitrators and advocates in arbitration proceedings.¹¹⁰ This

¹⁰³ *Id.* at 714.

¹⁰⁴ *Teaching Arbitration*, *supra* note 12, at 225.

¹⁰⁵ Sternlight, *supra* note 100, at 684 ("Often [ADR] courses focus more attention on negotiation and mediation than on arbitration.").

¹⁰⁶ A recent survey showed that only 32 of 168 law schools taught labor arbitration, while 29 out of 168 law schools taught international commercial arbitration. *Teaching Arbitration*, *supra* note 12, at 226.

¹⁰⁷ *Id.* at 225.

¹⁰⁸ Huber, *supra* note 35, at 255. And yet only 36 out of 168, or 21%, of law schools teach arbitration as a stand alone course. *Teaching Arbitration*, *supra* note 12, at 225. And yet another issue that must be considered in this context is that arbitration as a self-contained course may lead to the same low-enrollment issues discussed above.

¹⁰⁹ Katheryn M. Dutenhaver, *Dispute Resolution and Its Purpose in the Curriculum of DePaul University College of Law*, 50 FLA. L. REV. 719, 729 (1998).

¹¹⁰ *Id.*

lack of expertise can be overcome, however, by either attending a training conference on arbitration¹¹¹ or by creating one's own teaching materials.¹¹² Preparing materials to be used in one's class reinforces the expertise of the teacher in her subject. It also gives the teacher an intellectual stake in the curricular effort and encourages the teacher to repeat the course in the future.¹¹³

On the one hand, arbitrators and some attorneys may be valuable as part-time professors or as adjuncts. This is because they understand not only the arbitration process in general, but also the practical implications of new developments in this rapidly growing field.¹¹⁴ On the other hand, these professional arbitrators and attorneys are often unfamiliar with teaching methodologies and the general goals of the law school curriculum.¹¹⁵ Team-teaching, combining the experiences of both full-time professors and practitioners, may therefore be the best way to proceed when teaching an arbitration course.¹¹⁶ Of course, there are disadvantages to team-teaching as well, including the lack of cohesiveness in such a course if the participating professors are not aware of what is being taught when they are not in the classroom and disagreements over teaching methodologies. For this reason, if team-teaching is utilized, close interaction between the professors is a must to ensure a coherent lesson plan for the students.

¹¹¹ For instance, the Straus Institute for Dispute Resolution at the Pepperdine University School of Law offers professional training courses in many areas of ADR, including arbitration. For a description of the program, see The Straus Institute for Dispute Resolution, http://law.pepperdine.edu/straus/training_and_conferences (last visited Feb. 22, 2006).

¹¹² Ronald M. Pipkin, *Teaching Dispute Resolution in the First Year of Law School: An Evaluation of the Program at the University of Missouri-Columbia*, 50 FLA. L. REV. 609, 647 (1998).

¹¹³ *Id.*

¹¹⁴ See Dutenhaver, *supra* note 109, at 726–27.

¹¹⁵ *Id.* at 727.

¹¹⁶ See *id.* Another option would be to utilize guest lecturers or speakers. While full-time professors would teach classes, arbitrators and attorneys could occasionally be invited to speak to the class on specific issues relating to their experience and expertise. The author has utilized this approach with much success in non-arbitration seminar-type courses.

C. The Scope of an Effective Arbitration Curriculum¹¹⁷

It is reasonable to assume that the average layperson will know very little about arbitration.¹¹⁸ Therefore, legally educated individuals should be able to explain basic details and answer common questions regarding the process. A course in arbitration should therefore enable the student to answer such common questions as: How and where do arbitrations take place? Does an outside agency administer the proceedings? Who are the fact finders in arbitration? How are arbitrators chosen? What qualifies them to be arbitrators? Who do arbitrators work for? What happens if an arbitrator makes a mistake, is prejudiced against one party, or engages in other misconduct?¹¹⁹

In addition to helping students answer these basic arbitration law questions, an effective arbitration curriculum should have the following components. First, an introduction to arbitration should include a comparison of arbitration to other methods of dispute resolution such as litigation and conciliation, emphasizing that the appropriate method to be utilized in any one case must be determined on an *ad hoc*, case-by-case basis.¹²⁰ Also, an introduction should address the theories and motives behind arbitration, including discussions about the need of parties to save time and money, to create flexible processes with the ability to conform to the individual needs of parties, and to craft resolutions that serve these needs.¹²¹

The instructor should also stress that not all transactions are suited for

¹¹⁷ The suggested areas of study discussed below are a compilation of topics covered by syllabi on the Association of American Law School (AALS) Alternative Dispute Resolution Section's web page. Ass'n of Am. Law Schools, Dispute Resolution Syllabi, http://www.law.missouri.edu/aalsadr/DR_syllabi.htm (last visited Feb. 22, 2006).

¹¹⁸ This is especially true given the complexities of the arbitration field as demonstrated in Parts II and III above. See *supra* Parts II, III.

¹¹⁹ Sternlight, *supra* note 100, at 687 ("Arbitration courses are quite different than mediation and negotiation courses. The typical arbitration course focuses on Supreme Court cases dealing with commercial and/or labor arbitration. Rather than teaching students to be arbitrators, or to be attorney-advocates within the arbitration process, the course more frequently examines case law on such issues as when and whether arbitration clauses are valid, the nature of arbitrators' powers and authority, and the circumstances under which arbitral decisions are to be enforced or instead vacated."); see also JEAN R. STERNLIGHT, ARBITRATION SYLLABUS (Fall 2003), <http://www.law.unlv.edu/faculty/sternlight/pdf/717-1-s.pdf> [hereinafter SYLLABUS].

¹²⁰ Riskin, *supra* note 97, at 594.

¹²¹ SYLLABUS, *supra* note 119.

arbitration, and not all forms of arbitration are relevant to all transactions.¹²² Additionally, the role of the arbitrator or arbitrators should be covered, followed by a discussion of the characteristics, qualifications, and ethical duties of an arbitrator. Equally important is a discourse on how arbitration is initiated by demand and answer, as well as the peculiar role that discovery—emphasizing the limited nature of discovery—and scheduling play in the overall arbitration process. The arbitral hearing itself should also be discussed with regard to the presentation of cases, evidentiary rules (or lack thereof), closing arguments, and substitution of written briefs in place of live evidentiary arguments before an arbitral tribunal.

Finally, special attention should be given to the arbitral award and the termination of proceedings. In discussing the arbitral award, the ability to limit potential awards must be tackled. Further discussion should include whether arbitrators are required to explain the reasoning behind their awards or give written opinions. Another important concern regarding arbitration deals with the limited judicial review given to arbitral awards and the procedures by which parties can either have an award enforced or vacated by a federal tribunal.¹²³

Furthermore, no arbitration course would be complete without instructing students on how practically to draft a legally enforceable arbitration provision. Emphasis should be placed on the drafter's ability to include provisions that benefit the particular client. Indeed, the drafter's primary goal is to create—and in some cases negotiate—a clause that meets the client's needs and protects its interests. Drafters must be aware of the flexibility of the arbitration process so that they can take full advantage of this flexibility within the limits of the applicable law.

Last, not only should an arbitration law class instruct students on various domestic arbitration models, but also on international arbitration models and specific models adopted by other countries. Because arbitration allows parties to dictate the laws and rules governing their disputes, this latitude necessitates that lawyers be open to the advantages offered by the arbitral procedures of other jurisdictions, regardless of where they practice. In order

¹²² See Catherine Kessedjian, *Business Transactions* 5 (Apr. 7, 2004), <http://www.aals.org/international2004/Papers/kessedjian.pdf> (working draft of paper presented at AALS Conference in May 2004). For instance, it is essential to address the issue of whether a dispute is arbitrable and thus subject to arbitration. Stuart M. Widman, *What's Certain is the Lack of Certainty About Who Decides the Existence of the Arbitration Agreement*, *DISP. RESOL. J.*, May–July 2004, at 54, 60.

¹²³ 9 U.S.C. § 10 (2002 & Supp. 2004) (discussing FAA provisions dealing with vacation and enforcement of arbitral awards).

to utilize these choices, attorneys must have a basic understanding of foreign procedures. The most common rules utilized in transnational arbitrations are those of UNCITRAL, the International Chamber of Commerce, the American Arbitration Association, and The London Court of International Arbitration (LCIA). Consequently some emphasis should be placed on each of these organizations.¹²⁴

D. Effective Pedagogical Methods for Teaching Arbitration Law

Having thrashed out possible placements for arbitration law in the American and Japanese legal curriculum, potential teachers for these courses, and the scope of the topics to be discussed in such courses, what remains is an exploration of the most important consideration: how to most effectively teach arbitration law in the classroom environment. To some extent, the methodology chosen both depends on the strengths of the teacher(s) selected, as well as the background knowledge and experience of those being taught. Nevertheless, available arbitration teaching methodologies can be categorized into one of two groups: theory-centered methods and skill-centered methods. When considering the methods discussed below, however, it is important to keep in mind that arbitration professors should not necessarily confine themselves to only one type of teaching method. Rather, individual professors should combine the different techniques discussed below to arrive at a classroom dynamic which best suits their individual teaching style, as well as the preferred learning styles of their students.

1. Theory-Centered Methods

The theory-centered method focuses on modifying the traditional Socratic lecture format, along with applying other forms of pedagogy that focus on the theory underlying arbitration law.

i. Lectures

The most obvious method of conveying the theories underlying

¹²⁴ See Grégoire Marchac, Note & Comment, *Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA and UNCITRAL Rules*, 10 AM. REV. INT'L ARB. 123, 124–25 (1999) (discussing the nature of the various international arbitration organizations).

arbitration law is through lecturing.¹²⁵ While students must learn the theories of arbitration law, simply presenting students with this body of information, without more, is likely to be unproductive.¹²⁶ In order to be academically challenged, students must become intellectually engaged with the information put before them.¹²⁷ To encourage engagement in lectures, teachers should stress the importance of asking questions in class.¹²⁸ Instructors should also urge students to write down questions that they think of in-between classes and present them during the next class.¹²⁹ When multiple students have questions, it may be most effective to take several questions at once.¹³⁰ This allows the professor to allocate more time to

¹²⁵ Pipkin, *supra* note 112, at 640. The lecture method, the Socratic approach being a popular variant in American law schools, is one of the most common teaching methods in the traditional law school curriculum and is useful in both large and small classes. However, in attempting to keep the class interested, it is not enough simply to regurgitate material; the professor should make sure to engage the students' interest, not only with thought-provoking questions, but by getting the students to voice their own thoughts as often as possible. *Id.* at 641.

¹²⁶ Japanese legal reformers appear to have come to this same conclusion and have argued more recently for a shift away from mass lectures to a "small group education system" that provides "bi-directional (with give-and-take between teacher and students) and multidirectional (with interaction among students) educational programs rich in content." THE JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL—FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY, ch. III, pt. 2, § 2(2)d (2001), <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.

¹²⁷ Levin, *supra* note 94, at 12. Another way of keeping lectures interesting is by utilizing guest lecturers. *See supra* note 116.

¹²⁸ Having Japanese law students participate in class may be particularly challenging given that they are not accustomed to this practice. Maxeiner & Yamanaka, *supra* note 2, at 319. Indeed, as discussed above, such enthusiastic participation by a Japanese law student may be seen as too much showmanship. *See supra* note 38 and accompanying text.

¹²⁹ Alternatively, another effective way to make students feel "invested" in the learning process is to assign students to lead class discussion. By requiring each student in a class to teach a lesson, this forces each student to learn at least part of the course material in considerably more depth than they might in a traditional lecture environment. When a student feels that the person teaching the class is a peer rather than a superior, it is likely that they will often be more willing to participate in the discussion at hand because there will be less of a feeling of intellectual inferiority towards the person with whom they are debating. Of course, such an approach would require a relatively small class size so that each student could be assigned to lead a discussion.

¹³⁰ John Barkai, *Innovations in ADR Pedagogy: What Do I Do In My ADR Class that You Might Not Be Doing?*, in 2003 ANNUAL MEETING WORKSHOP ON DISPUTE

answering the questions deemed most beneficial to the entire class.¹³¹ In utilizing this strategy, it is important to approach students, whose questions may not have been fully covered, outside of class to follow-up.¹³²

ii. *Other Theory-Centered Methods*

Another effective theory-centered method involves application of arbitration laws and arbitral organization rules to sample arbitration agreements. Through analyzing an agreement, students observe the flexibility of arbitration and are provided examples of how to draft effective provisions. Some arbitration professors in America also utilize student-written discussion questions.¹³³ Assigning students to submit written discussion questions and corresponding answers requires students to analyze the material gleaned from lectures and assigned readings. These questions can be used to promote class discussions, allowing other students to benefit from the insights of their classmates.

As part of this same approach, students can be assigned to keep arbitration journals. The purpose of requiring students to write journal entries is to assist students in reflecting on what they are learning and chart the progress of that learning.¹³⁴ If the teacher requires students to submit journal entries at intervals during the course, these entries may also provide the instructor with feedback on the learning that is occurring and the effectiveness of the teaching methodologies being used.¹³⁵ If the teacher does not require the submission of journal entries until the end of the course, the feedback provided can still be utilized in altering the methodologies for teaching the class in the future.¹³⁶

Journal entries should address what the student is learning and

RESOLUTION 74 (2003), available at <http://www.aals.org/am2003/booklet.pdf>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Kathleen Whitby, Alternative Dispute Resolution Theory and Practice Syllabus, <http://law.wustl.edu/Courses/Whitby/Fall2005/syllabus.html> (last visited Feb. 7, 2006).

¹³⁴ John Barkai, Negotiation and ADR Syllabus and Related Materials, <http://www2.hawaii.edu/~barkai/neg/J-508-05.doc> (last visited Jan. 25, 2006).

¹³⁵ *Id.* Of course, the drawback of having students submit their journals to the professor is that they may not write candidly knowing that the professor will be reviewing their journal entries and might, in fact, fashion their journal entries in a way they believe the professor might best like.

¹³⁶ *Syllabus, supra* note 119.

experiencing in the course, such as: what was learned from simulation experiences; whether a certain technique was more or less effective compared to one used in a previous exercise; and how particular reading assignments or class discussions have impacted the student's perception of arbitration.¹³⁷ The entries should be analytical, not just merely a record of what happened in class on a certain day.¹³⁸ Criticism of opinions expressed in a reading or in class discussion is appropriate if it is supported by analysis.¹³⁹ Instructors should emphasize the personal and confidential nature of journal entries and students should be encouraged to focus on personal reflection, not just what they assume the instructor wants to read.¹⁴⁰

Finally, another theory-centered strategy involves the traditional approach of assigning students to write a research paper.¹⁴¹ The teacher can either suggest topics or allow the students to choose issues that particularly interest them. Potential topics may involve policy issues, sociological insights, or practical concerns implicated by arbitration.¹⁴² For this assignment to be effective, instructors should require that these papers be based on outside research, not just the assigned reading for the course.¹⁴³ One way that the entire class can benefit from these research papers is by requiring the authors to give a presentation of their research in front of the class at the end of semester.¹⁴⁴ These presentations may be given in a lecture format or they may include simulations or other interactive exercises.¹⁴⁵ Regardless, the important aspect of having students present their papers is that it gives them a chance to develop their oral advocacy and communications skills, an essential weapon in the arsenal of the complete lawyer.

¹³⁷ *Id.*

¹³⁸ Barkai, *supra* note 134.

¹³⁹ *Id.*

¹⁴⁰ *Syllabus*, *supra* note 119.

¹⁴¹ *Id.* This teaching method can be very effective in giving students a thorough knowledge of subject material because it forces the students to spend a significant amount of time researching and considering the material. However, with this method, the majority of study takes place outside of the classroom, so it should be combined with other methods. Also, there is a danger that the student will only concentrate on their research topic to the detriment of learning other important topics.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* Creative presentations, however, would more likely be effective in engaging the class in an interesting discussion.

2. Skill-Centered Methods

While a basic theoretical understanding of arbitration law is necessary, once such foundational knowledge is established it is also imperative to develop the student's practical skills as well.¹⁴⁶ The most effective way of refining these types of practical skills is by allowing students to interact with their peers.¹⁴⁷ In this vein, "learning by doing"¹⁴⁸ or cooperative learning is the primary skill-centered technique utilized in teaching arbitration.¹⁴⁹

i. Role-Playing and Cooperative Learning

There are many different types of role-playing, but what follows are some suggested alternatives. One idea is to issue general rules and instructions explaining the nature of these exercises and the student commitment that will be required.¹⁵⁰ These role-playing exercises begin by providing participating students with a script of facts tailored to their assigned roles.¹⁵¹ A student or a team of students is assigned to represent each party in the arbitration. Students may also be assigned to take on the role of arbitrator.¹⁵²

Another alternative is to secretly assign specific roles and only give the "secret" instructions and goals to the students on a need-to-know basis. Regardless of group size, this helps keep students interested in the project, while simultaneously giving them a more realistic view of how arbitration works in practice. The student should be instructed to strive to their utmost to achieve this goal during the course of the arbitration. The professor may additionally assign the students various goals with differing levels of

¹⁴⁶ Kimberlee Kovach, *ADR Education: The Promise of Our Future*, DISP. RESOL. J., Sept. 1996, at 56, 58.

¹⁴⁷ *Id.* Such a learning orientation is also consistent with the new Japanese legal education model which wishes to increase the use of interactive methods in the classroom. Maxeiner & Yamanaka, *supra* note 2, at 320.

¹⁴⁸ Riskin, *supra* note 97, at 597.

¹⁴⁹ Sternlight, *supra* note 100, at 688 ("By contrast, ADR courses tend to be less adversarial in their orientation, focusing more on class discussion, exercises, and group projects as a means to help students learn not only the law but also the psychology and counseling techniques necessary to be a good lawyer.").

¹⁵⁰ Whitby, *supra* note 133.

¹⁵¹ Pipkin, *supra* note 112, at 641.

¹⁵² *Id.*

importance. This will demonstrate to the student how truly difficult it can be to attain the goals that their employer, union, or client want them to achieve.

On the other hand, the “fishbowl” technique can be a powerful teaching tool for larger groups of students.¹⁵³ Under the “fishbowl” technique, a small group of actors play their roles in front of the rest of the classroom.¹⁵⁴ This is an alternative way for students not involved in the actual role play to observe the proceedings from an objective or detached standpoint, from which they often may be able to more aptly recognize problems or learn good arbitral techniques.¹⁵⁵

An essential part of the “fishbowl” method is that the students—both those involved in the actual role play and those observing—must be able to reflect and discuss what they have seen. When a professor sees something good or bad happening, or simply wants to take a moment to discuss what is happening in a role play activity, he may choose to “freeze frame” and open the class up for discussion. That is, the professor will tell the role players to stop where they are in the role play so that the class may reflect on what they have seen.¹⁵⁶

¹⁵³ See generally WOLFGANG BEYWL & SUSAN MÄDER, THE FISHBOWL METHOD IN EVALUATION, http://univation.org/download/Fishbowl_engl_kurz.pdf (last visited Feb. 22, 2006). This is an especially valuable technique insofar as large arbitration classes are concerned, as there seems to be some prejudice by professors to use role-playing as a teaching method only in smaller groups. See DWIGHT GOLANN, THE MORE THE MERRIER? TEACHING A LARGE ADR SURVEY COURSE (2003), http://www.law.missouri.edu/aalsadr/Syllabi/golann_teaching_large_survey_class.htm. Nevertheless, larger classes may be the only practical option when teaching arbitration and large classes are advantageous because they give more students access to the curriculum. *Id.*

¹⁵⁴ Beywl & Mäder, *supra* note 153, at 1. Those selected to participate in the fish bowl role play can be given additional points for the additional work entailed.

¹⁵⁵ *Id.*

¹⁵⁶ Also, the point can be made here that, just like in real life, when an arbitration process breaks down the judiciary will intervene, so will the professor stop the simulation if he or she feels the arbitration guidelines are not being sufficiently followed. The professor may also take the time during one of these “interventions” to explain that the judiciary intervenes in arbitration only when the process falters, not generally when the judiciary does not like the substantive outcome of the arbitration. See William H. Daughtrey, Jr. & Donnie L. Kidd, Jr., *Modifications Necessary for Commercial Arbitration Law to Protect Statutory Rights Against Discrimination in Employment: A Discussion and Proposals for Change*, 14 OHIO ST. J. ON DISP. RESOL. 29, 64 (1998) (“Commercial arbitration has thrived under the federal policy favoring its use by substantially limiting judicial intervention into the process and by the courts’ standing ready to enforce awards.”).

Regardless of the technique utilized, after the scenario is acted-out, feedback and reflection are essential. Professors need to provide feedback on the techniques used during the simulation to emphasize good techniques and to discourage bad ones. Group debriefing allows students not only to learn from the experience but also to teach their fellow students.¹⁵⁷ Teachers may also want to videotape the simulations.¹⁵⁸ While post-exercise discussion is helpful, only so much of what occurred can be remembered. Also, of course, memory is not always accurate. By replaying the video, a student can observe his own performance to determine what needs improvement—including overcoming distracting mannerisms or poor body language—and what was effective.¹⁵⁹

There are many advantages to the simulation method. Simulations are a substantial departure from the typical method of teaching: the lecture.¹⁶⁰ The exercises cause students and teachers to view the method as something “special,” resulting in students allocating more time and effort to the exercises.¹⁶¹ Also, students enjoy the break from traditional class routine and appreciate the social aspect of these exercises.¹⁶² The student interaction afforded by simulations allows students the opportunity to become more familiar with their classmates and thus encourages them to be more diligent in their participation for the benefit of others as well as for themselves.¹⁶³ Finally, simulation exercises are memorable, not only because they are entertaining or unusual, but because they require both physical and mental activity.¹⁶⁴

ii. *Other Effective Skill-Centered Methods*

Besides simulations and role-playing, other effective skill-centered methods exist. For example, the teacher may assign students to write arbitral opinions. The instructor gives students a simulation fact pattern, instructing them that as arbitrators they are to draft a decision. Emphasis is placed on the ability to issue awards for one party, all parties, or no parties. This exercise

¹⁵⁷ Vaughn, *supra* note 101, at 704.

¹⁵⁸ *Id.* at 705.

¹⁵⁹ Kovach, *supra* note 146, at 152.

¹⁶⁰ Pipkin, *supra* note 112, at 640.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

can be effective for reviewing the duties of an arbitrator and the constraints—or lack thereof—on their ability to issue awards, including what type of conduct or decision could subject their award to vacation on review.¹⁶⁵ Alternatively, students could be asked to write an arbitral brief on behalf of one side or the other of the dispute. The professor would give students a simulation fact pattern, instructing them that as the lawyers for one of the parties involved they are to write a brief that will substitute for the in-person arbitral hearing. This exercise reviews the process of the arbitral hearing and reiterates that arbitrations can be conducted not only in person, but also by different forms of communication.

A further strategy that certainly will help students develop skills is holding or attending moot arbitration competitions. While similar to classroom simulation exercises, the competitive nature of the moot competitions replicates the burden to succeed for one's client in a true arbitration.¹⁶⁶ Recognizing the pressure to "win" for one's client is imperative, given the limited nature of review with arbitral decisions under most arbitration statutes. Currently, there at least two international moot arbitration competitions in which students can participate.¹⁶⁷

Finally, observation of actual arbitral procedures is an indispensable part of a comprehensive arbitration education. Although it would be ideal for

¹⁶⁵ For instance, one may examine the role that external law may play in the arbitrator's decision. LAURA J. COOPER & DENNIS R. NOLAN, *LABOR ARBITRATION: A COURSEBOOK* 61–85 (1994) (providing an overview of the role of external law in labor arbitration).

¹⁶⁶ See VAJAYANTI JOSHI, *HOW TO TEACH? WHAT TO TEACH? SOME REFLECTIONS ON PEDAGOGY*, <http://www.aals.org/international2004/Papers/Joshi.pdf> (last visited Feb. 22, 2006).

¹⁶⁷ According to my colleague, Professor Eric Bergsten, the Willem C. Vis International Commercial Arbitration Moot, centered in both Hong Kong and Vienna, will host 151 law schools in April 2006 from around the world, of which 35 will be from the United States and one from Japan. According to one author: "[P]articipation in the annual Willem C. Vis International Commercial Arbitration Moot Court as a student is a way of 'marking' oneself to the seasoned members of international commercial arbitration as destined for greatness in the field." Benjamin G. Davis, *The Color Line in International Commercial Arbitration: An American Perspective*, 14 AM. REV. INT'L ARB. 461, 516 (2003); see also Vis International Commercial Arbitration Web Site, <http://www.cisg.law.pace.edu/vis.html> (last visited Feb. 22, 2006) (Vienna) and <http://www.cityu.edu.hk/slwcisgmoot/> (last visited Feb. 22, 2006) (Hong Kong). Additionally, there is the Inter-collegiate Negotiation Competition in Japan which has an arbitration component. This competition has a thirty page problem for the competition. See generally <http://www.osipp.osaka-u.ac.jp/inc/comp3rd/> (last visited Feb. 22, 2006).

students to take a field trip and have the opportunity to witness live arbitral proceedings,¹⁶⁸ not all students will be presented with this opportunity.¹⁶⁹ Therefore, it may be beneficial for students to watch DVDs or videotapes of actual or simulated arbitral proceedings.¹⁷⁰ Another benefit of these video resources is that they may also be used in designing exam questions.¹⁷¹ Through the use of video, students can be presented with realistic replications of situations they will likely face in practice.¹⁷²

V. CONCLUSION

Just as the process of arbitration is flexible, the law professor of arbitration must be as well.¹⁷³ An instructor should modify the teaching methods utilized based on classroom dynamics and the educational needs of students. While all of the pedagogical methods presented in this paper are effective for teaching arbitration law to one degree or another, a professor should not confine herself to one teaching method, but rather should combine the many different techniques in a way that most effectively allows students to learn and understand the material.¹⁷⁴ For instance, a professor could lay

¹⁶⁸ For instance, in the past, this author has sent labor law students to attend labor arbitrations in the State of Mississippi. Although it is necessary to obtain the permission of the parties and the arbitrator, most participants should be more than willing to oblige. And to the person, each student who took part in these field trips expressed that they had gained a more complete understanding of arbitration through the experience.

¹⁶⁹ Carrie Menkel-Meadow, *To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum*, 46 SMU L. REV. 1995, 2003 (1993). Indeed, it may be more difficult to organize such trips if the law school is isolated or there are relatively few arbitration opportunities in the area.

¹⁷⁰ One possible video teaching resource that can be used to give students a feel for what arbitration looks like when it is practiced by professionals is "Arbitration Interactive." Center for Transnational Law, Arbitration Interactive, http://www.central.uni-koeln.de/content/e13/e207/e25/index_ger.html (last visited Feb. 22, 2006). The DVD/video portrays the various parts of an international commercial arbitration, using "actors" who are well-versed in international arbitration. There is also a book that comes with the material that helps to integrate what the beginning student learns from the Arbitration Interactive DVD/video.

¹⁷¹ Kovach, *supra* note 146, at 152.

¹⁷² *Id.*

¹⁷³ *Id.* at 151.

¹⁷⁴ Accord Maxeiner & Yamanaka, *supra* note 2, at 328 ("We hope that [Japanese law professors] will perceive the essence of professional education, that they will develop [the] education in new ways that unite law and practice, and that they will find the

the groundwork for a role-playing exercise by utilizing lectures and guest speakers, along with field trips to an arbitration. Subsequently, cooperative learning, either of the traditional role-playing variety or of the fishbowl kind for larger classes, can be undertaken so that students may actively interact with each other and explore the nuances of arbitration law. Finally, the professor could assign students to write arbitral decisions, briefs, or research papers on facets of the simulation, and select those who achieve the top grades to participate in moot arbitration competitions.

In short, an arbitration law professor should constantly evolve her teaching methods both to the material and to the students, utilizing what works the best, and discarding that which seems ineffective. Furthermore, because there are many different types of learners, what might work well in one class or with one student may not work effectively—or at all—with a different class or student. Consequently, arbitration professors must remain vigilant at all times and continually strive to be as creative as possible in conveying the material within the constraints of the academic environment.

In the end, even if the implementation of an effective arbitration curriculum will inevitably cause the conscientious professor to confront seemingly intractable issues and problems of pedagogy, thereby causing frustration and disappointment, ignoring arbitration law all together is no longer an option. Law students, as the leaders of tomorrow, will be instrumental in helping to resolve local, regional, national, and even international disputes.¹⁷⁵ Many of these disputes will be decided through arbitration. It is essential, therefore, that the students of today be well versed in this form of dispute resolution and its multifarious uses as the practitioners of tomorrow. In turn, this familiarization will breed respect for the arbitral process and lead to the promotion of arbitration as a valid, if not preferable, alternative to litigation.

median between legal education and practical training.”).

¹⁷⁵ Pipkin, *supra* note 112, at 618.

